STUART F. DELERY
Assistant Attorney General
COLIN A. KISOR
Acting Director
ELIZABETH J. STEVENS
Assistant Director
JENNIFER A. BOWEN
Trial Attorney, District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-3558
Email: *Jennifer.Bowen@usdoj.gov*

Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AUDLEY BARRINGTON LYON, JR., *et al.*, Plaintiffs, vs. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *et al.*, Defendants.	Case No. 3:13-cv-05878-EMC **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL (ECF No. 14)** Hearing: Date: April 3, 2014 Time: 1:30 p.m., Courtroom #5 Judge: Edward M. Chen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Immigration and Nationality Act of 1952, As Amended:

MISCELLANEOUS

I. INTRODUCTION

This immigration case involves a challenge to the adequacy of telephone access afforded those detained by U.S. Immigration and Customs Enforcement ("ICE") at three facilities outside of San Francisco. Four named plaintiffs – Audley Barrington Lyon, Jr. ("Lyon"); Edgar Cornelio ("Cornelio"); José Elizandro Astorga-Cervantes ("Astorga-Cervantes"); and Lourdes Hernandez-Trujillo ("Hernandez-Trujillo") (collectively, "Plaintiffs") – seek to certify a class consisting of "[a]ll current and future immigration detainees who are or will be held by ICE in Contra Costa, Sacramento, and Yuba Counties." Mot. (ECF No. 14) at Notice of Motion; Compl. (ECF No. 1) ¶ 83. Because Plaintiffs seek to certify an overly broad class that cannot meet the requirements of Federal Rule of Civil Procedure 23, Defendants[1] request that the Court deny Plaintiffs' motion in its entirety.

II. NAMED PLAINTIFFS

Two of the four named plaintiffs remain detained by ICE in the three detention centers at issue in this litigation. Named plaintiff Cornelio has not been in ICE detention since his removal to Guatemala on February 11, 2014. *See* Decl. of Michael Vaughn ("Vaughn Decl."), ¶ 9, attached as Ex. A to Declaration of Jennifer

[1]Defendants in this action include ICE; John Sandweg ("Sandweg"), Acting Director of ICE; U.S. Department of Homeland Security ("DHS"); Jeh Johnson ("Johnson"), Secretary of DHS; and Timothy Aitken ("Aitken"), Field Office Director for the ICE Enforcement and Removal Operations ("ERO") Field Office in San Francisco (collectively, "Defendants"). Mr. Sandweg will resign from his position as Acting Director of ICE effective February 21, 2014. His successor will be substituted under Federal Rule Civil Procedure 25(d) on all future filings.

A. Bowen. And named plaintiff Astorga-Cervantes posted bond and was released from ICE custody on February 20, 2014. *Id.* ¶ 19.

A. Audley Barrington Lyon, Jr.

Lyon, a native and citizen of Jamaica, was placed into removal proceedings in October 2013 before the Immigration Court in San Francisco, California; he has been charged as removable under 8 U.S.C. § 1227(a)(2)(B)(i), based on a 2008 controlled substance conviction. *See* Vaughn Decl., ¶¶3, 5. Since October 22, 2013, Lyon was previously detained by ICE at the West County Detention Facility in Richmond, Contra Costa County, California ("Contra Costa facility") under the mandatory pre-removal order detention scheme imposed 8 U.S.C. § 1226(c).[2] *Id.* ¶ 6. Lyon is represented in his removal proceedings by an attorney from Centro Legal de la Raza. *Id.* ¶ 8.

B. Edgar Cornelio

At his removal hearing on January 23, 2014, an Immigration Judge ordered Cornelio removed to Guatemala. *Id.* ¶ 9; *see also* Order of the Immigration Judge, attached as Ex. B to Bowen Decl. Cornelio waived his right to appeal this removal order, rendering the removal order final. Vaughn Decl. ¶ 9. On February 11, 2014, Cornelio was removed to Guatemala. *Id.*

---

[2] Under the mandatory pre-removal order detention scheme imposed by 8 U.S.C. § 1226(c), absent exceptions not applicable or pursued in his case, Lyon is not eligible for a bond hearing for the first six months of his pre-removal order detention. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1139 (9th Cir. 2013) (holding that a mandatory detainee must be afforded a bond hearing following six months of detention (hereinafter, "*Rodriguez* bond hearing")).

C. José Elizandro Astorga-Cervantes

Following an October 2013 arrest, Astorga-Cervantes, a native and citizen of Mexico, was placed into removal proceedings before the Immigration Court in San Francisco, California. *Id.*, ¶¶ 16, 18. ICE charged him with removability under 8 U.S.C. § 1227(a)(2)(A)(iii), based on a 1992 narcotics conviction. *Id.* ¶ 18. Astorga- was taken into ICE custody on November 20, 2013, and detained at the Rio Cosumnes Correctional Center in Sacramento County, California ("Sacramento facility"), which is located in the Eastern District of California. *Id.* ¶ 19. Astorga-Cervantes was detained under the pre-removal order detention scheme governed by 8 U.S.C. § 1226(a). *Id.* On January 23, 2014, an Immigration Judge granted him bond in the amount of $6,000. *Id.* Astorga-Cervantes posted bond and was released from custody on February 20, 2014. *Id.* Astorga-Cervantes is represented in his removal proceedings by an attorney with the American Civil Liberties Union. *Id.* ¶ 22.

D. Lourdes Hernandez-Trujillo

Hernandez-Trujillo, a native and citizen of Mexico who overstayed her B-2 visitor visa, which expired in March 2008, was placed into removal proceedings in November 2012 before the Immigration Court in San Francisco, California. *Id.* ¶ 23-24. ICE charged her with removability under 8 U.S.C. § 1227(a)(1)(B) as an overstay who remained in the United States without authorization. *Id.* ¶ 24. Initially detained at the Sacramento facility, Hernandez-Trujillo has been detained at the Yuba County Jail ("Yuba facility") since April 2013. *Id.* ¶ 25. Based on a

criminal conviction for armed robbery, Hernandez-Trujillo is subject to mandatory pre-removal order detention under 8 U.S.C. § 1226(c). *Id.* The attorney representing Hernandez-Trujillo in her removal proceedings has declined Hernandez-Trujillo's right to a bond hearing, pursuant to the Ninth Circuit's decision in *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) . *Id.* ¶ 27. Hernandez-Trujillo is next scheduled for an individual hearing before an Immigration Judge on March 13, 2014. *Id.* ¶ 28

III. FEDERAL RULE OF CIVIL PROCEDURE 23

Plaintiffs seeking certification of a proposed class must first demonstrate the existence of the four required elements set forth in Rule 23(a) of the Federal Rules of Civil Procedure:

> (1) the class is so numerous that joinder of all members is impracticable ["numerosity"];
>
> (2) there are questions of law or fact common to the class ["commonality");
>
> (3) the claims or defenses of the [named plaintiffs] are typical of the claims or defenses of the class ("typicality"); and
>
> (4) the [named plaintiffs] will fairly and adequately protect the interests of the class ("adequacy of representation").

Fed. R. Civ. P. 23(a). In addition to these four prerequisites, plaintiffs who propose to certify their class under Rule 23(b)(2) – as Plaintiffs do in this action – must show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2). "The party seeking class certification bears the burden of demonstrating that the requirements of Rules 23(a)

and (b) are met." *United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th Cir. 2010); s*ee also Wal–Mart Stores, Inc. v. Dukes*, --- U.S. ---, 131 S.Ct. 2541, 2551 (2011) (same). The failure to meet "any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975). The Supreme Court has held that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982).

IV. ARGUMENT

Plaintiffs' motion for class certification should be denied for several reasons. First, Plaintiffs' proposed class is overly broad and not limited to those individuals who are or will be "held in government custody *pending deportation proceedings*." Compl. ¶ 1 (emphasis added). Second, Plaintiffs have not shown that they meet the prerequisites of Rule 23(a), requiring adequate representation, commonality, and typicality. Finally, Plaintiffs fail to show that their proposed class meets the cohesiveness required to certify a class under Rule 23(b)(2).

A. The Proposed Class Is Not Adequately Defined.

"Although there is no explicit requirement concerning the class definition in [Rule] 23, courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed." *Lukovsky v. San Francisco*, No. C 05–00389 WHA, 2006 WL 140574, *2 (N.D. Cal. Jan. 17, 2006) (quoting *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679–80 (S.D. Cal. 1999)). In other words, "[a] class definition should be 'precise, objective, and presently ascertainable.'" *O'Connor v.*

Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998) (quoting Manual for Complex Litigation, Third § 30.14, at 217 (1995)). Because Plaintiffs' proposed class definition is overly broad and not precisely defined, their motion for class certification should be denied.

Plaintiffs propose to certify a class consisting of "[a]ll current and future adult immigration detainees who are or will be held by ICE in Contra Costa County, Sacramento County, or Yuba County." Compl. ¶ 83. Yet the very first sentence of their Complaint declares that "[t]his is a class action for injunctive and declaratory relief necessary to remedy ongoing violations of the constitutional and statutory rights of immigrants held in government custody *pending deportation proceedings*." Compl. (ECF No. 1) ¶ 1 (emphasis added); *see also* Mot. (ECF No. 14) at 11 (asserting that "[a]ll members of the proposed class are held in ICE custody *while awaiting* deportation proceedings" (emphasis added)). Plaintiffs also admit that they only seek to represent those ICE detainees who are "*[t]rying to [d]efend [t]hemselves*" in removal proceedings. Mot. (ECF No. 14) at 3 (emphasis added). Because the class definition they propose is not so limited, Plaintiffs admit that their proposed class is overly broad. As defined by Plaintiffs, the proposed class consists of all individuals detained by ICE regardless of whether any removal proceedings are or have been pending. Plaintiffs' conclusory assertion that "all class members have, have had, or likely will have immigration proceedings before the San Francisco Immigration Court," does not meet their burden to adequately define the class they seek to represent. Mot. (ECF No. 14) at 3-4 (citing Compl. (ECF No.

1) ¶ 37). Indeed, not all ICE detainees who are detained under 8 U.S.C. § 1225(b) or § 1231 in Yuba, Contra Costa, or Sacramento County will necessarily have or have had proceedings before the San Francisco Immigration Court. Plaintiffs have failed to adequately define the class they seek to certify.

B. The Proposed Class Does Not Meet Requirements of Rule 23(a).

Additionally, Plaintiffs' motion must also be denied because the proposed class fails to meet the prerequisites for certification under Rule 23 of the Federal Rules of Civil Procedure. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 131 S. Ct. at 2550 (quotation marks omitted). Furthermore, a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Falcon*, 457 U.S. at 161. The class proposed by Plaintiffs in this litigation falls short of satisfying the requirements of Rule 23(a)(2)-(4).[3]

1. <u>The Named Plaintiffs Cannot Satisfy the Adequate Representation Required by Rule 23(a)(4).</u>

While Defendants do not question that Plaintiffs' counsel can adequately represent the proposed class,[4] Plaintiffs themselves have not demonstrated that

---

[3] Defendants do not at this time challenge whether the proposed class meets the numerosity requirement of Rule 23(a)(1), but reserve the right to do so in the future should grounds arise for such a challenge.

[4] "Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4) of the Federal Rules of Civil Procedure, those questions have, since 2003, been governed by Rule 23(g)." *Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d

they "will fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(4). Courts consider two issues when assessing whether named plaintiffs can adequately represent the proposed class: (1) whether the named plaintiffs have any conflicts of interest with other class members, and (2) whether the named plaintiffs will prosecute the action vigorously on behalf of the class. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Indeed, "uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009).

First, Plaintiffs cannot show that Cornelio will be an adequate class representative given his removal to Guatemala on February 11, 2014. *See* Vaughn Decl. ¶ 9. Cornelio was ordered removed from the United States by an Immigration Judge on January 23, 2014. *Id.* Cornelio waived any right to appeal that removal order, rendering it a final removal order and resulting in his removal. *Id.* Given this development, Cornelio has not and cannot demonstrate that he can adequately represent Plaintiffs' proposed class.

Second, none of the four named plaintiffs can adequately represent any ICE detainee who alleges that his or her detention has been prolonged by inadequate telephone access. Lyon is detained under the mandatory pre-removal order detention scheme governed by 8 U.S.C. § 1226(c), which precludes Lyon from

---

Cir. 2010) (citing Fed. R. Civ. P. 23(g), 2003 Advisory Committee Note). "Thus, under the plain language of the rule, a district court's decision to certify a class must *precede* the appointment of class counsel." *Id.* (emphasis in original).

seeking release on bond at this time. *See* Vaughn Decl., ¶ 6. Prior to his removal to Guatemala, Cornelio was released on bond in August 2010, but had that bond revoked in September 2013 after he was arrested and incarcerated for driving under the influence of alcohol in July 2013. *Id*. ¶¶ 12-14. Astorga-Cervantes was granted release on $6,000 bond, which he posted on February 20, 2014. *Id*. ¶ 19. And Hernandez-Trujillo has declined, through her attorney, to seek release on bond pursuant to the Ninth Circuit's decision in *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013). Therefore, none of the named plaintiffs can evidence any causation between their detention and any allegedly inadequate telephone access.

Third, only one of the four named plaintiffs alleges that she requested assistance with placing a legal call from one of the three detention facilities. Hernandez-Trujillo is the only named plaintiff to allege that she requested assistance, but that her "request was denied." *See* Decl. of Hernandez-Trujillo (ECF No. 14-5), ¶ 16 (failing to confirm the number of requests made – if more than one – or whether she was told the reason for the denial). No other named plaintiff has made such an assertion. *See generally* Decl. of Lyon (ECF No. 14-2); Decl. of Astorga-Cervantes (ECF No. 14-3); Decl. of Cornelio (ECF No. 14-4). To the extent there are options at each facility to request a private legal phone call that will not automatically cut off after a certain time period and that is free for any indigent detainee, a detainee's decision not to pursue such options will be a defense in this litigation. The failure of three of the four named plaintiffs to assert having ever sought assistance in placing a call from their respective detention facilities allows

for the inference of a conflict between those named plaintiffs and the class they propose to represent, precluding them from demonstrating that they can adequately represent the proposed class.

Finally, to the extent Plaintiffs are allowed to certify the class as they have defined it, Plaintiffs have not and cannot show that they will adequately represent any ICE detainees who are subject to a detention statute other than 8 U.S.C. § 1226. *See* Vaughn Decl. ¶¶ 6, 14, 19, 25. Only Cornelio – who has not shown that he can serve as an adequate class representative from Guatemala – has been subject to mandatory post-removal order detention under 8 U.S.C. § 1231. *Id.* ¶ 9. Additionally, Plaintiffs do not and cannot allege that any of the four named plaintiffs have been subject to detention under 8 U.S.C. § 1225(b), a detention scheme that affords "limited due process protection." *Rodriguez*, 715 F.3d at 1140. Plaintiffs cannot demonstrate that they can adequately represent their proposed, overly-broad and imprecisely-defined class, as required by Rule 23(a)(4).

2. Plaintiffs Cannot Satisfy the "Commonality" Required by Rule 23(a)(2).

Rule 23(a) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To satisfy this commonality prerequisite, the proposed class members must "have suffered the same injury." *Dukes*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 157). Plaintiffs cannot satisfy this burden by merely alleging that all of the proposed class members have "suffered a violation of the same provision of law" or raise some "common questions." *Id.* ("[The commonality] language is easy to misread, since any competently crafted class complaint literally

raises common 'questions.'"). Rather, the proposed class members' claims must depend upon a common contention, the determination of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Although "[t]he existence of shared legal issues with divergent factual predicates is sufficient [to establish commonality]," *Hanlon*, 150 F.3d at 1019, commonality cannot be established where there is wide factual variation requiring individual adjudications of each class member's claims. *See Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656, 663-64 (N.D. Cal. 1976).

Plaintiffs have moved to certify a class consisting of "[a]ll current and future adult immigration detainees who are or will be held by ICE in Contra Costa County, Sacramento County, or Yuba County." Mot. (ECF No. 14) at Notice of Motion; *see also* Compl. (ECF No. 1) ¶ 83. This proposed class fails the commonality required by Rule 23(a)(2). First, Plaintiffs' attempt to raise a "systemic challenge" to their conditions of confinement will require a showing of "widespread actual injury." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Yet, those detainees within the proposed class who are ineligible to seek relief from removal or who are awaiting removal proceedings cannot evidence the "actual injury" required to contest their conditions of confinement. As noted by the *Lewis* Court, "depriving someone of a frivolous claim . . . deprives him of nothing at all." *Id.* at 353 n.3. Because an unknowable and indeterminable number of potential class members will not be able to demonstrate any actual injury, Plaintiffs' broadly defined class cannot meet the commonality threshold required by Rule 23(a)(2).

Moreover, Plaintiffs' "mere allegations of systemic violations of the law . . . will not automatically satisfy Rule 23(a)'s commonality requirement." *See, e.g., Lightfoot v. District of Columbia*, 273 F.R.D. 314, 324 (D.D.C. 2011) (decertifying a class for failure to meet the commonality required by Rule 23(a)(2)) (quoting *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010)). Rather, any analysis of Plaintiffs' claims regarding violations of constitutional and statutory rights caused by lack of telephone access will necessarily require an independent analysis with respect to each separate facility and the alternative options available for placing telephone calls at each facility. Unlike the class certified in *Abadia–Peixoto v. DHS*, 277 F.R.D. 572 (N.D. Cal. Dec. 23, 2011), in which the plaintiffs challenged a single ICE policy applying to the entire class, Plaintiffs in this action challenge various practices at three detention facilities. *See generally* Compl. (ECF No. 1). Rather, Plaintiffs challenge several practices, which they do not and cannot allege stem from any overriding policy applicable to all facilities.

As such, any determination as to the legality of practices contested by Plaintiffs will require independent and separate considerations as to each facility. *See, e.g., Turk v. Plummer*, Case No. C 94-3043 VRW, 1994 WL 508678, at *1 (N.D. Cal. Sept. 2, 1994) ("Pretrial detainees and prisoners' [constitutional rights are] subject to rational limitations in the face of legitimate security interests of the penal institution."); *Valdez v. Rosenbaum*, 302 F.3d 1039 (9th Cir. 2002) (denying the plaintiff's constitutional claims where "the telephone restriction was rationally related to a legitimate government interest [and the plaintiff] "had alternative

means of exercising his right to communicate"). The legal and factual questions as to adequate telephone access at each facility at issue in this litigation preclude Plaintiffs from meeting the commonality required by Rule 23(a)(2).

3. Plaintiffs Cannot Satisfy the "Typicality" Required by Rule 23(a)(3).

Plaintiffs have likewise failed to demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement of Rule 23(a)(3) "derives its independent legal significance from its ability to screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are present." *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 598 (3d Cir. 2012) (internal quotation omitted). Thus, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class member." *Falcon*, 457 U.S. at 156. For the same reasons that Plaintiffs cannot satisfy the adequacy and commonality prerequisites Rule 23(a), Plaintiffs also cannot satisfy the typicality requirements of Rule 23(a)(3).

C. Rule 23(b)(2) Precludes Plaintiffs Proposed Class.

"The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 131 S. Ct. at 2557 (internal quotation omitted) (emphasis added). In this litigation, unlike that before the *Abadia-Peixoto* Court, Plaintiffs do not

challenge a single policy applying to all facilities, but rather various practices amongst the facilities. As such, Plaintiffs have failed to show that any order by this Court could apply to the entirety of the proposed class. Rather, Plaintiffs' allegations of wrongdoing will require this Court to consider those claims on a facility-by-facility basis. As this Court has held, "the right to access to counsel is not absolute, but must be balanced against the legitimate government interest in maintaining the security and safety of prison facilities." *Manly v. Sonoma County*, Case No. C-92-3228 EFL, 1993 WL 742803, at *2 (N.D. Cal. Feb. 22, 1993) (citing *Bell v. Wolfish*, 441 U.S. 520, 546 (1979)). Plaintiffs have failed to show that their proposed class can meet the cohesiveness required by Rule 23(b)(2).

V. CONCLUSION

This Court should deny Plaintiffs' motion for class certification. Plaintiffs have failed to adequately define their class, resulting in an overly broad and unascertainable class. Additionally, Plaintiffs have failed to carry their burden and demonstrate that their proposed class meets the requirements of Rule 23.

//

//

//

DATED: February 21, 2014

STUART DELERY
Assistant Attorney General
Civil Division

COLIN A. KISOR
Acting Director

ELIZABETH J. STEVENS
Assistant Director

/s/ Jennifer A. Bowen
JENNIFER A. BOWEN
Trial Attorney
District Court Section
Office of Immigration Litigation
Civil Division
United States Department of Justice

Attorneys for Defendants

CERTIFICATE OF SERVICE
No. 3:13-cv-05878-EMC

I hereby certify that on this 21st Day of February 2014, a true and correct copy of **Defendants' Response in Opposition to Plaintiffs' Motion for Class Certification and Appointment of Class Counsel (ECF No. 14)** was served with the Clerk of Court by using the CM/ECF system, which provided an electronic notice and electronic link of the same to all attorneys of record through the Court's CM/ECF system.

/s/ Jennifer A. Bowen
JENNIFER A. BOWEN
Trial Attorney, District Court Section
Office of Immigration Litigation
Civil Division
United States Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044